upon the child was promptly removed and not seen again. I was told there was a reason for this, in my view, utterly unnecessary and inexcusable incident but to this day no reason has yet been advanced.

In the result for the reasons I have given I am satisfied that the contents of the petition have been sufficiently proved. I pronounce a decree nisi for the dissolution of the marriage. I condemn the respondent in the costs of the suit, such costs to be on the higher scale. I direct that this decree nisi shall not be made absolute for a period of three months from the date hereof.

Decree nisi.

Solicitors: *Rodyk & Davidson*; *S. K. Lee & Co.*

RE L.Y. SWEE & CO. LTD.; KHOO LEONG KEE v. L.Y. SWEE & CO. LTD.

[O.C.J. (Raja Azlan Shah J.) May 28, 1968]
[K.L. — Originating Motion No. 2 of 1968]

Companies — Motion for rectification of register of company — Applicant personal representative of deceased shareholder — Application resisted on ground that company had lien over deceased's shares — Whether applicant entitled to "clean" certificate — Interpretation of memorandum and articles of company — Companies Act 1965, ss. 103, 162 and 163.

Practice and Procedure — Costs — Solicitor for company improperly appointed — Costs to be paid by directors — Companies Act, 1965, s. 139(5).

This was an application to rectify the register pursuant to section 162 of the Companies Act by striking out the name of one *L* deceased as holder of 1,400 shares in the respondent company and inserting in lieu thereof the name of the applicant.

The deceased died sometime in 1963 and until his death was the chairman of the board of directors of the respondent company. The applicant (the widow of the deceased) was the sole surviving executor and trustee of the estate of the deceased. The other directors were the applicant and two nephews of the applicant. In December 1967 the applicant applied to have her name registered against the shares standing in the name of the deceased. On this being refused she wrote through her solicitor to the respondent company forwarding the grant of probate and a draft resolution signed by the applicant for signature by the directors. The grant of probate and the draft resolution was returned unsigned. In January 1968 the applicant was served with a writ (Suit No. 21 of 1968) alleging that a sum of $93 898.94 was due and owing by the estate of the deceased to the respondent company. The applicant then made the present application to rectify the register.

Held: (1) where a shareholder in a company dies and the transmission clause in its articles of association is in the form of clause 39 the personal representative is entitled to be registered in respect of and to have a certificate of the shares and the company has no right to enter in the register of members or in the certificate any statement as to the company's claim under its articles to a lien on the shares for the liability of the deceased to the company;

(2) as the claim to the lien in Suit No. 21 of 1968 was altogether denied and the action was being resisted, the applicant was entitled to a "clean" certificate like that possessed by the person from whom she derived her title;

(3) article 39 of the articles of association of the company enabled personal representative to be registered as a member in respect of the deceased's shares. It did not stipulate that the personal representative must apply to be registered in a representative capacity;

(4) the register therefore ought to be rectified in terms of the motion and the directors must bear the costs of this application.

An application to question the authority of counsel to act for a company may be made at any stage in the proceedings, even at the conclusion of the trial.

Cases referred to:—

(1) *Moodie* v. *W. & J. Shepherd Ltd.* [1949] 2 All E.R. 1044.

(2) *Scott* v. *Frank F. Scott (London) Ltd.* [1940] 3 All E.R. 508.

(3) *Danish Mercantile Co. & Ors.* v. *Beaumont & Ors.* [1951] 1 All E.R. 95.

(4) *Russian &c. Bank* v. *Comptoir de Mulhouse* [1925] A.C. 112.

(5) *Simmons* v. *Liberal Opinion Ltd.* [1911] 1 K.B. 966.

ORIGINATING MOTION.

J. J. Puthucheary and *S. D. K. Pedlie* for the applicant.

R. Talalla for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah J.: This is an application for an order to rectify the register pursuant to the provisions of section 162 of the Companies Act, 1965, by striking out the name of Law Joo Jin, deceased, as holder of 1,400 shares in the respondent company standing at the moment in the name of the said deceased and by inserting in lieu thereof the name of the applicant as the holder of the said shares and other consequential reliefs.

A brief narration of the facts which have led to this unfortunate litigation will explain the position of the parties. The respondent company is a private company incorporated under the Companies Enactment, of which Law Joo Jin, deceased, was the governor and chairman of the board of directors until his death on January 30, 1963. He left a trust disposition and settlement dated November 13, 1959 of which the applicant (widow of deceased) is the sole surviving trustee and executrix nominated therein and acting thereunder. The surviving directors are the present applicant, and the deceased's nephews Law Joo Hone and Law Joo Kuen. At the time of his death the deceased owned 1,400 shares of $100 each in the said company which is 91 per cent of the whole share capital. The applicant holds 20 such shares in her own right.

On January 18, 1968 the applicant was served with a writ alleging that a sum of $93,898.94 is due and owing to the respondent company by the estate of the deceased (*vide* Kuala Lumpur Civil Suit No. 21 of 1968).

On November 21, 1967 the applicant put forward a resolution at a meeting of the directors that she be registered as a member in respect of the shares registered in the name of the deceased. She principally relied on article 38. The said resolution was not passed as one of the directors, Law Joo Kuen, was of the view that article 19 did not permit the transfer of any shares from any estate which was indebted to the company.

On December 12, 1967 her solicitors wrote to the secretary of the company enclosing the grant of probate and a draft resolution signed by her to be circulated to the other two directors for their signature under article 111 which provides that directors may take decisions by unanimous agreement if the resolution was circulated to them. The resolution taken in November 1967 was confirmed on December 14, 1967. On January 11, 1968 the applicant received a letter from the company's solicitors which stated that the other two directors were not prepared to sign the resolution. Both the resolution and the grant of probate were returned to her.

On January 24, 1968 she initiated the present motion to rectify the register.

In answer to her affidavit in support of her motion, Law Joo Kuen filed an affidavit on behalf of himself and the other director, Law Joo Hone, It is to be observed that this affidavit was not filed on behalf of the company. In that affidavit it was stated that the grant of probate sent to the company did not sufficiently evidence the applicant's right to the shares registered in the deceased's name. Alternatively, it was contended that the said shares be transmitted subject to the company's first and paramount lien pursuant to articles 19 and 39. It was further alleged that no instrument of transfer in writing of the said shares from the deceased or the applicant had ever been presented to the company. Laches and lack of *bona fides* were also pleaded. These two pleas were, however, not seriously pressed in argument.

The applicant subsequently obtained an amended schedule of properties annexed to the grant of probate which specified the said shares. On March 26, 1968 her solicitors wrote to the secretary of the company, sending the grant of probate with the new schedule of assets and requesting the registration of the applicant as the holder of those shares. There was no reply from the said company. The applicant subsequently received a copy of the minutes of a meeting of the board of directors held on April 1, 1968. She did not attend the meeting. The minutes read:—

"The chairman and the other director, Mr. Law Joo Kuen, decided to hand over the matter to the company's solicitors, Messrs Richard Talalla & Co., Kuala Lumpur, with instructions to attend to the matter as they feel that it is not proper to transfer the 1,400 shares to the name of Khoo Leong Kee and if they do so, they will be held solely responsible by the other shareholders of the company and the company will have no claim whatsoever against the estate of Law Joo Jin for the amount due and owing to the company by the deceased, Law Joo Jin."

At that meeting they purported to confirm and rectify the appointment of Messrs Richard Talalla & Co. with effect from December 1, 1967 with two specified matters. They also resolved to give effect to the appointment in writing and under the company's seal. That was not done.

The argument addressed to me takes two shapes. The main argument is whether the application is to be regarded as a transfer, properly so-called, of shares in the respondent company or a transmission of such shares. The distinction between transfer and transmission on death is important and is well recognised in company law. Transfer in its natural meaning connotes a transfer from one person to another. There must be a transferor and a transferee. In such a case a proper instrument of transfer must be delivered to the company: see section 103(1) of Companies Act, 1965. The section does not affect any power of the company to register as a shareholder any person to whom the right to any shares in the company has been transmitted by operation of law. Transmission is the term used when shares vest in some person by operation of law, such as on the death or bankruptcy of a member. The relationship of transferor and transferee is lacking: see *Moodie* v. *W. & J. Shepherd Ltd.*[1]

The personal representative of a deceased member does not *ipso facto* become a member of the company. He becomes so in one of two ways: (1) Unless the articles of association otherwise provide, (see *Scott* v. *Frank F. Scott (London) Ltd.*[2]), he applies to have the shares registered in his name. This is not a transfer, properly so-called, and therefore an instrument of transfer is not required. He is personally liable to pay all calls but can claim indemnity against the estate of the deceased member. (2) He applies to be registered as a personal representative under the provisions of section 163(1) of the Act. This section enables trustees, executors and administrators of the deceased shareholder's estates to become registered as such trustees, executors and administrators (see Aus ralian Company Law & Practice by *Wallace & Young* at p. 466). This course subjects him only to the same liabilities as he would have been subjected to if the shares had remained registered in the name of the deceased. His liabilities are not so onerous as in (1) above.

The answer to the question must therefore depend on the provisions of the articles of association of the respondent company. Articles 34 to 37 govern the transfer of shares, and any regulations contained therein dealing with their transfer must be strictly followed. The respon-

sibility of accepting or rejecting a transfer of shares rests with the directors.

Putting it briefly, these provisions do not apply to the present case. This is not a case of transfer of shares to a non-member. I am of the view that this is purely a case for registration as a member in respect of the deceased's shares, and therefore, the provisions governing the transmission of shares apply. The material articles are 38 and 39 which read as follows:—

"38. In the case of the death of a member, the survivors or survivor where the deceased was a joint holder, and the executors or administrators of the deceased where he was a sole or only surviving holder, shall be the only persons recognised by the company as having any title to or interest in his shares, but nothing herein contained shall release the estate of a deceased joint holder from any liability in respect of any share jointly held by him.

39. Subject to article 1 hereof, any person becoming entitled to a share in consequence of the death or bankruptcy of any member shall upon producing such evidence of title as having regard to section 72 of the Companies Ordinance 1940 the directors may from time to time properly require, have the right either to be registered himself as a member in respect of the share, or subject always to the provisions as to transfers herein contained, to make such transfer of the share as the deceased or bankrupt person could have made but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the same by the deceased or bankrupt person before the death or bankruptcy."

Article 38 speaks for itself. The present applicant, being the sole surviving executrix, is the only person recognised by the respondent company as having a title to the deceased's shares. On production of the grant of probate with the amended schedule of assets annexed thereto, she has under the provisions of article 39 the right either to be registered herself as a member in respect of the deceased's shares or, subject to the restrictions with regard to transfer, to make such transfer as the deceased could have made in his lifetime. She chose the former. I think she is well entitled to take that course.

I now consider the other argument that the shares are to be transmitted, if at all, subject to the company's lien. The company claimed that a lien has accrued in respect of certain monies and they have brought an action *vide* Civil Suit No. 21 of 1968 for the purpose of establishing and enforcing that lien. The claim to a lien is altogether denied, and the action is being resisted. *Prima facie* I am of the view that the applicant is entitled to a "clean" certificate like that possessed by the person from whom she derives her title.

It was further said that it is essential to register the shares in the form proposed for the protection of the company. Counsel has failed to show me that that is necessary. The company claimed to have a lien and is entitled to that lien, if at all, by virtue of the articles, and the certificate is only granted in form "subject to the memorandum and articles of association." No estoppel arises against the company if it were to grant a "clean" certificate. They have power under their articles to decline to register any transfer of shares upon which the company has a lien and I think that it is not necessary to register the shares in the form proposed for the protection of the company, and that it would be detrimental to the present applicant who is now asking for registration. The certificate is evidence of the legal title; the applicant is entitled to be put on as the legal owner of these shares and it seems to me that she is entitled to a "clean" certificate.

If there were any probability or prospect of of a fraudulent or wrongful dealing on the part of the applicant in the shares, so soon as she came into possession of the certificate, the true remedy of the company would be, as it seems to me, to apply for an injunction in the pending action to restrain her from dealing in any way with the certificate, but I do not think they have any right at all to register the shares subject to the lien, which might lead to serious inconvenience.

Putting it in a nutshell the position is this: where a shareholder of a company dies and the transmission clause in its articles of association is in the form of clause 39, the personal representative is entitled to be registered in respect of and to have a certificate of the shares, and the company has no right to enter in the register of members or in the certificate any statement as to the company's claim under its articles to a lien on the shares for the liabilities of the deceased to the company.

In the course of a further argument, Mr. Talalla, on behalf of the company, contends that the applicant is not entitled to the order in terms of the motion as it was made in her personal capacity and not in her representative capacity, by way of an application for transmission under the provisions of section 163(1) of the Act. Counsel says that the latter course would have been more appropriate, in which case the company would have had no objection. The contention, in my view, cannot be upheld. Article 39 enables a personal representative to be registered as a member in respect of the deceased's shares. It does not stipulate that the personal representative must apply to be registered in a representative capacity.

The argument that the motion must specifically ask for transmission of shares is also baseless. As I have indicated earlier, the personal representative's rights *qua* member are two-fold. He can either pursue the rights made available under the articles of association or to invoke the provisions of section 163(1) of the Act. The section is an enabling section. It merely confers a power, and does not, of itself,

do anything more. The personal representative in the present case has applied to be registered as a member in pursuance of article 39.

A further argument adumbrated is that as the applicant is not entitled to the shares, a transfer is not possible. The short answer to this is this: this is not a transfer, properly so-called.

For the above reasons, the register ought to be rectified in terms of the motion. I will now hear argument as to costs.

[*After hearing arguments as to costs, the following judgment was delivered on May 30, 1968:*]

Raja Azlan Shah J.: Mr. Puthucheary on behalf of the applicant had argued that costs should be borne by the directors individually or against Mr. Talalla personally. Counsel submitted that if Mr. Talalla's fees are to be paid for objecting to rectification, his client would have to pay 96.4 per cent. of the costs. In such event he said that his client finances both the objection and the present application, and therefore it is vital that he raised a technical point so that the estate is not made to suffer. He raised the point that Mr. Talalla had acted without authority. The basis for the proposition seems to be this: at the meeting of directors held on 14th December 1967 it was resolved to appoint Mr. Talalla to oppose the present motion. The minutes of that meeting were read and confirmed at a meeting of directors held on 1st April 1968. Clauses 5 and 6 of the minutes are relevant and I reproduce them.

"5. It has been resolved to effect the said appointment in writing under the Company's Seal.

"6. It has also been resolved that the instrument evidencing the said appointment shall have thereto affixed the Company's Seal in the presence of Messrs. Law Joo Kuen and Law Joo Hone as Directors and the Secretary and such Directors and the Secretary shall sign the instrument to which the Seal is so affixed in their presence."

The applicant who is also a director did not attend these two meetings. As no such document bearing the company's seal existed the resolution could not be perfected.

Mr. Talalla's main argument was directed to the doctrine of ratification. He submitted that the resolution appointing him was ratified at a meeting held on 1st April 1968. He relied on *Danish Mercantile Co. & Ors.* v. *Beaumont & Ors.*,[3] which establishes the principle that an action brought by agents in the name of a limited company without its authority and where later the company went into liquidation may be ratified and adopted by the liquidator and the defect cured.

I take the view that this is not a case of ratification but one of appointment of solicitor to institute proceedings on behalf of the company. The essence of ratification is *prima facie* the authorisation of unauthorised acts. In the present case, Mr. Talalla's authority to act for the company depended on the resolution made and confirmed on 1st April 1968. The company had resolved that the instrument evidencing the appointment must be signed by and in the presence of both the directors Law Joo Kuen and Law Joo Hone and the secretary and that the company's seal must be affixed to the instrument in their presence. That was the form the resolution was made. In my view the resolution was valid in the sense that it was made at a meeting of the directors at which a quorum was present and the authority to affix the seal was founded on the express provision of article 117. The unfortunate part of it is that the resolution could not be perfected because (1) the company's seal had not been affixed to the instrument of appointment, and (2) even if that had been done it violated against the express provisions of section 139(5) of the Companies Act which reads:—

"(5). A provision requiring or authorising a thing to be done by or in relation to a director and the secretary shall not be satisfied by its being done by or in relation to the same person acting both as director and as, or in place of, the secretary."

For the above reasons the contention that the want of a seal is a pure formality must also fail.

The result seems to be that Mr. Talalla had no authority to represent the company.

The other argument proffered by Mr. Talalla was the question of waiver. On the strength of *Russian &c. Bank* v. *Comptoir de Mulhouse*,[4] he submitted that an application to question the authority of counsel to act for the company should have been made promptly to avoid the answer that it was ratified. Since the applicant had failed to do that it was said that she had waived her right and thus estopped from raising this point. The short answer to that is, as it seems to me, that there was no waiver. The application to question the lack of authority may be made at any stage in the proceedings, even at the conclusion of the trial. (See *Simmons* v. *Liberal Opinion Ltd.*[5]).

In the circumstances the directors must bear the costs of this application.

Order accordingly.

Solicitors: *Skrine & Co.; Richard Talalla & Co.*